Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors

HIGH COURT (PENANG) – SUIT NO 311 OF 1982
EDGAR JOSEPH JR J
18 APRIL 1988

Civil Procedure – Discharge of interim prohibitory injunction – Application for – Addition of defendants – Plea of res judicata or issue estoppel – Distinction between interlocutory order and final order – Altered circumstances – Risk of breach of the peace – Judicial decision inter partes operates as an estoppel, in favour of, and against parties and privies only, not third persons or strangers – Burden of proof – Serious questions to be tried – Distinction between the doctrine of res judicata and the doctrine of judicial precedent – Balance of convenience – Sufficiency of the plaintiff's undertaking as to damages – Rules of the High Court 1980, O 89

On 21 July 1982, Mustapha J had granted an ex parte interim prohibitory injunction restraining the first and second defendants, their servants or agents, from proceeding with any development work on a plot of land ('the said plot') pending the determination of an application by the plaintiffs for extension of their injunction. However, after a lengthy inter partes hearing, the learned judge dismissed the plaintiffs' application for extension of the injunction.

The court, upon an opposed ex parte application by summons-in-chambers, though unsupported by affidavit, by the first and second plaintiffs (the third plaintiff being dead) as occupiers of the said plot, had, on an urgent basis, heard argument by counsel on both sides and being satisfied that there was a prima facie case of real emergency where time was of the essence, granted an ex parte interim prohibitory injunction the effect of which was to restrain the first and second defendants, their servants or agents, as developers and contractors, from entering the said plot.

In the event, the first defendant applied by summons-in-chambers for discharge of the interim injunction. At the same time, there was also an application by summons-in-chambers by the plaintiffs to add Perumahan Farlim (Malaysia) Sdn Bhd and Thean Tatt Construction Sdn Bhd as the third and fourth defendants on the ground that it was they and not the first and second defendants who, as developers and contractors, were working on the plot at the material time and for an interlocutory injunction directed against them the effect of which was to restrain their entry therein.

The court subsequently added and substituted the third and fourth defendants for the first and second defendants in the interim injunction and discharged the interim injunction insofar as it was directed against the first and second defendants, their servants or agents. Furthermore, the court would treat the first defendant's application for the discharge of the interim injunction as one for the discharge of the interim injunction directed against the third and fourth defendants, their servants or agents.

A preliminary point of law was raised by counsel for the defendants, being a plea of res judicata in its wider sense or issue estoppel.

Held: (1) The order of Mustapha J refusing the plaintiffs' interlocutory injunction insofar as the vegetable plot was concerned, on the ground that damages would be an adequate remedy, was merely a prima facie view and lacked the essential element of finality since it is always open to the High Court, at the final hearing, to review the question involved and to arrive at an opposite conclusion in the light of all the evidence both oral and documentary should the circumstances so require. Accordingly, the legal effect of the refusal of the interlocutory injunction was simply that, at the interlocutory stage, based on the limited material then available, the plaintiffs were not entitled to the injunction relief claimed.

(2) The law invests the High Court, after dismissing the application for interlocutory injunctive relief, with continuous authority thenceforth to entertain any application by the disappointed party for the like relief, on proof of altered circumstances and to grant such relief if it appears to be warranted by the evidence.

(3) In all the circumstances the court was thoroughly convinced that the plea of res judicata and/or issue estoppel was devoid of substance and it was accordingly dimissed.

(4) In all the circumstances, on the usual undertaking as to damages, the court had, in the exercise of its discretion, granted to the plaintiffs an interlocutory injunction restraining the third and fourth defendants whether by themselves or their servants or agents or otherwise howsoever from entering, trespassing and/or carrying out works on the said plot until the final determination of this suit or until further order.

(5) The balance of convenience lay in favour of the plaintiffs. The application for discharge of the interim injunction directed against the third and fourth defendants, the servants or agents and for consequential orders was dismissed with costs.

(6) An early trial of the suit is ordered.

Cases referred to

1 *Re N (Infants)* [1967] Ch 512 (refd)
2 *PS Refson & Co Ltd* v *Saggers* [1984] 1 WLR 1025 (refd)
3 *Lee* v *Department of Education and Science* (1967) Atkins' Court Forms Vol 22 p 78 (1980 issue) (refd)
4 *WEA Ltd* v *Visions Channel 4 Ltd* [1983] 1 WLR 721, 724 col D-F (refd)
5 *Allen & Ors* v *Jambo Holdings Ltd & Ors* [1980] 2 All ER 502 (refd)
6 *Fidelitas Shipping Co* v *V/O Exportchleb* [1966] 1 QB 630 (refd)
7 *Hock Hua Bank Ltd* v *Sahari bin Murid* [1981] 1 MLJ 143 (refd)
8 *Langmead* v *Mapley* (1865) 18 CBNS 255; 144 ER 441 (refd)
9 *Huntley (Marchioness)* v *Gaskell* [1905] 2 Ch 656 (CA) (refd)
10 *Bozson* v *Altrincham Urban District Council* [1903] 1 KB 547 (CA) (refd)
11 *Fellowes* v *Fisher* [1976] QB 122 (refd)
11a *Hoystead* v *Commissioner of Taxation* [1926] AC 155 (distd)
12 *Duchess of Kingston's* case (1776) 2 Smith C (13th ed) 644, 645 (refd)
13 *Douglas* v *Forrest* (1828) 4 Bing 686; 130 ER 933 (refd)
14 *Don* v *Lippmann* (1837) 5 Cl & Fin 1; 7 ER 303 (refd)
15 *Holland* v *Clark* (1842) 1 Y & C Ch Cas 151; 62 ER 831 (refd)
16 *Re South American and Mexican Co, ex parte Bank of England* [1895] 1 Ch 37 (CA) (refd)
17 *R* v *Blakemore* (1852) 21 CJMC 60; 169 ER 560 (refd)
18 *Re Allsop and Joy's Contract* (1889) 61 LT 213 (refd)
19 *Attorney-General for Trinidad* v *Eriche* [1893] AC 518 (PC) (refd)
20 *O'Connor* v *O'Connor* [1916] 2 Ir R 148 (refd)
21 *Carl-Zeiss Stiftung* v *Rayner and Keeler Ltd* [1966] 2 All ER 536 (HL) (refd)

22 *Fernando* v *Gunatillaka* [1921] 2 AC 357 (PC) (refd)
23 *O'Keefe* v *Williams* (1907) 5 CLR 217 (HCt of Aus) (refd)
24 *Blohn* v *Desser* (1962) 2 QB 116 (refd)
25 *American Cyanamid* v *Ethicon Ltd* [1975] AC 396 (folld)
26 *Leong San Tong Khoo Kongsi (Penang) Registered & Ors* v *Poh Swee Siang* [1987] 2 MLJ 611 (refd)
27 *Re Waring, Westminster Bank Ltd* v *Burton-Butler* [1948] Ch 221 (refd)
28 *Marginson* v *Blackburn Borough Council* [1939] 2 KB 426 (refd)
29 *McPhail* v *Persons, Names Unknown; Bristol Corporation* v *Ross & Anor* [1973] 3 All ER 393 (refd)
30 *United Engineers (M) Bhd* v *Lim Kit Siang* [1988] 2 MLJ 12 (refd)
31 *Mok Deng Chee* v *Yap See Hoi & Ors* [1981] 2 MLJ 321 (refd)
32 *Bank Negara Indonesia* v *Philip Hoalim* [1973] 2 MLJ 3 (refd)
33 *Lim Khoo Eong* v *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & 2 Ors* [1987] 2 MLJ 621 (refd)
34 *Inwards* v *Baker* [1965] 2 QB 29; [1965] 1 All ER 446 (refd)
35 *Williams* v *Staite* [1979] Ch 291 (refd)
36 *Ives (ER) Investments Limited* v *High* [1967] 2 QB 379 (refd)
37 *Siew Soon Wah & Ors* v *Yong Tong Hong* [1973] AC 836 (refd)
38 *Luganda* v *Service Hotels Ltd* [1969] 2 Ch 209 (refd)
39 *Cayne* v *Global Natural Resources plc* [1984] 1 All ER 225 (refd)
40 *Francome* v *Mirror Group Newspapers* [1984] 1 WLR 892 (refd)
41 *Belfast Ropework Co Ltd* v *Pixdane Ltd* [1976] FSR 337 (refd)
42 *Dunhill (Alfred) Limited* v *Sunoptic SA & Anor* [1979] FSR 337 (refd)
43 *Garden Cottage Foods Ltd* v *Milk Marketing Board* [1984] AC 130 (refd)
44 *Fenner* v *Wilson* [1893] 2 Ch 656 (refd)
45 *Graham* v *Campbell* (1878) 7 Ch D 490 (refd)
46 *Newcomen* v *Coulson* (1878) 7 Ch D 764 (refd)
47 *Barclays Bank Ltd* v *Rosenberg*, Financial Times, 12 June 1985 (refd)

Legislation referred to
Rules of the High Court 1980 O 89

Mohideen Abdul Kader (Miss Meenakshi Raman with him) for the plaintiffs.

JA Yeoh and *R Rajasingam* for the defendants.

Cur Adv Vult

Edgar Joseph Jr J: Some four weeks ago, upon an opposed ex parte application by summons-in-chambers (en 56) though unsupported by affidavit, by the first and second plaintiffs (the third plaintiff being dead) as occupiers of a plot of land (hereinafter described), I had, on an urgent basis, heard argument by counsel on both sides, and being satisfied that there was a prima facie case of real emergency where time was of the essence, granted an ex parte interim prohibitory injunction to endure until Monday 21 March 1988 at 5.00 pm the effect of which was to restrain the first and second defendants who are Perumahan Farlim (Penang) and Sriwata Sdn Bhd, their servants or agents, as developers and contractors, from entering the said plot. There is plentiful authority supporting such a course of action and I need no more than refer to *Re N (Infants)*;[1] *PS Refson & Co Ltd* v *Saggers*;[2] *Lee* v *Department of Education and Science*;[3] *WEA Ltd* v *Visions Channel 4 Ltd*[4] and *Allen* v *Jambo Holdings Ltd*.[5]

In the event, the first defendant did apply by summons-in-chambers (en 59) for discharge of the interim injunction. At the same time, there was also before me an application by summons-in-chambers (en 62) by the plaintiffs, this time, to add Perumahan Farlim (Malaysia) Sdn Bhd and Thean Tatt Construction Sdn Bhd as the third and fourth defendants on the ground that it was they and not the first and second defendants who, as developers and contractors, were working on the plot at the material time, that is to say, on 18 March 1988, and for an interlocutory injunction directed against them the effect of which was to restrain their entry therein.

And so, at the outset, there being no objection by Mr Yeoh, counsel for the defendants, to the application for leave to amend the writ of summons and statement of claim adding the third and fourth defendants, I made an order accordingly.

Consequent upon this, I told counsel on both sides, that I proposed to substitute the third and fourth defendants for the first and second defendants in the interim injunction but, before I did so, I invited them to submit on the point if they so wished. Mr Mohideen Abdul Kader, counsel for the plaintiffs, raised no objection to the proposal. As for Mr Yeoh, all he said was this: 'The third and fourth defendants have complied with the order', which I took to be an unqualified admission that it was these defendants, their servants or agents, who were working on the plot concerned at the material time.

In these circumstances, I made the substitution aforesaid and discharged the interim injunction in so far as it was directed against the first and second defendants, their servants or agents. Furthermore, I told counsel I would treat the first defendant's application for the discharge of the interim injunction (en 59) as one for the discharge of the interim injunction directed against the third and fourth defendants, their servants or agents.

There is one other matter which deserves mention before I embark upon a discussion of the issues which arose for decision. My attention was drawn by counsel for the plaintiffs to the fact that the interim injunction, in the form it then took, was limited to only one dwelling house, to wit, no 301/259H, on the plot which also But, it was said that there was also another dwelling house, to wit, no 301/259H, on the plot which also required interim protection. So, after listening to argument, I thought it obviously right and fair to include the other dwelling house in the interim injunction but, of course, without in any way prejudging the issues which I had to determine.

It was on the above basis that the entire argument on the two cross applications before me proceeded for four full days, namely, 2 and 22 March 1988, and 4 and 5 April 1988 during which period the interim injunction was extended from time to time.

I must now turn to consider a preliminary point of law raised by counsel for the defendants being a plea of res judicata in its wider sense or issue estoppel, as it is sometimes known, which can only be understood if I refer to certain introductory matters.

In the suit herein, out of which the two applications before me arose, the plaintiffs claim that they were and are at all material times the lawful and protected tenants and are entitled both in law and equity to possession of that portion of the land forming part of holding no 2532, mukim 13, NED, Penang, and lot 2497, mukim 13, NED, Penang ('the plot concerned') on which are situated their two dwelling houses, bearing nos 426/258K and 301/259H, mukim 13, Thean Teik Estate ('the dwelling houses'), and their vegetable farm ('the farm'). The plaintiffs accordingly pray for a permanent injunction restraining the defendants whether by themselves, their servants and/or agents or otherwise, howsoever, from entering, trespassing or using the dwelling houses and the farm. Put briefly, the defence denies the averments aforesaid, denies the plaintiffs' entitlements to the reliefs claimed and counterclaims for possession, damages and for mesne profits.

On 21 July 1982 Mustapha J had granted an ex parte interim prohibitory injunction restraining Perumahan Farlim (Penang) Sdn Bhd and Sriwata Sdn Bhd, the first and second defendants, their servants or agents from proceeding with any development work on the dwelling houses and farm pending the determination of an application by the plaintiffs for extension of their injunction. However, after a lengthy inter partes hearing, the learned judge dismissed the plaintiffs' application for extension of the injunction on the following grounds:

(1) the vegetable lands were not 'premises' within the meaning of the Control of Rent Act 1966 and so, the defendants concerned were entitled to terminate the tenancy;
(2) all the plaintiffs had was an equity to the vegetable lands and this could be adequately compensated for by damages.

Explaining the effect of his order, he said this:

> ... the defendants/developers can enter and develop the vegetable plots but not to disturb or touch the houses which the plaintiffs are occupying.

The full text of his judgment is reported in [1983] 1 MLJ 348 and, as will be seen later, it was to figure prominently in the arguments before me. An appeal to the Supreme Court from the judgment aforesaid was brought but discontinued for reasons which are not clear to me.

Counsel's submission on res judicata was four-pronged and may be summarized thus: Firstly, the grounds relied upon for extension of the present interim injunction were substantially the same as those upon which the ex parte interim injunction of 21 July 1982 had been granted by Mustapha J. In particular, his lordship's judgment dismissing the application for extension of that ex parte interim injunction remains in full force and effect and so the plaintiffs' claims herein are barred by res judicata or issue estoppel.

Secondly, in dismissing the plaintiffs' application for extension of that ex parte interim injunction and dissolving it, Mustapha J had made an adjudication; most particularly, he had said:

> The practical effect of this order is that the defendants/developers can enter and develop the vegetable plots but not to disturb or touch the houses which the plaintiffs are occupying.

Thirdly, the order of Mustapha J, having been made after a lengthy argument in which both sides were heard, was a final order notwithstanding the fact that it was made on an interlocutory application. My attention was drawn to the following passages in the judgment of Lord Diplock in *Fidelitas Shipping Co* v *V/O Exportchleb*[6] at p 642:

> Where the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate court to adduce further evidence: ...
>
> This is but an example of a specific application of the general rule of public policy, nemo debet bis vexari pro una et eadem causa. The determination of the issue between the parties gives rise to what I ventured to call in *Thoday* v *Thoday* ([1964] P 181 at 198) an 'issue estoppel'. It operates in subsequent suits between the same parties in which the same issue arises. A fortiori it operates in any subsequent proceedings in the same suit in which the issue has been determined.

But, I would interpolate to add that in the same case, Lord Denning MR, who sat with Lord Diplock and Lord Danckwerts and delivered the leading judgment, said this at p 640 D to F:

> ... within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have

decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings. *But this again is not an inflexible rule. It can be departed from in special circumstances: see Henderson* v *Henderson* ([1843] 3 Hare 100 at 115); *Hoystead* v *Commissioner of Taxation* ([1926] AC 155 at 170) ...

(Emphasis supplied)

Fourthly, it was urged that Mustapha J having already decided, after a lengthy inter partes hearing, that the plaintiffs were not entitled to an interlocutory injunction in so far as the vegetable land was concerned, on the ground that damages would be an adequate remedy and, the order embodying his decision having been entered, the High Court was functus officio. My attention was drawn to the case of *Hock Hua Bank Bhd* v *Sahari bin Murid*[7] in which the judge had set aside an order for sale made in a foreclosure proceeding after an inter partes hearing and after it had been perfected. On appeal to the Federal Court, it was held that the judge was functus officio and had no jurisdiction to set aside his own order and so the original order was restored leaving it to the respondent to take out a fresh action to set aside the order on the ground of fraud.

But, it seemed to me, that the submissions of counsel overlooked two fundamental factors. Firstly, it is trite law that for a judicial decision to operate as res judicata it must be final in the sense that it leaves nothing to be judicially determined or ascertained thereafter in order to render it effective and capable of execution, and is absolute, complete, and certain, and when it is not lawfully subject to subsequent rescission, review or modification by the tribunal which pronounced it.

The true test of res judicata in its wider sense or issue estoppel may be stated thus: has there been a final determination of the issue? That is the crucial factor. The authorities show that for a determination there must be a final adjudication by the court: *Langmead* v *Maple*.[8] There must be a final and not an interlocutory order: *Huntley (Marchioness)* v *Gaskell*;[9] *Bozson* v *Altrincham Urban District Council*.[10]

Secondly, it is also trite law that the hearing of an application for an interlocutory injunction is not a trial on the merits. This is understandable for in such proceedings there is usually no oral evidence and no opportunity for cross-examination. Nor, for that matter, would there have been the full pre-trial process of discovery and inspection of documents at that stage. The relevant criteria applicable must, of necessity, be materially different as compared to that applicable to the trial of an action since at the interlocutory stage neither party's case can be said to be 'proved'. Having said that, it is true to say, as Lord Denning pointed out in *Fellowes* v *Fisher*[11] at p 129G:

Nearly always, however, these cases do not go to trial. The parties accept the prima facie view of the court or settle the case. At any rate, in 99 cases out of 100 it goes no further.

(Emphasis supplied)

In my opinion, the order of Mustapha J refusing the plaintiffs the interlocutory injunction in so far as the vegetable plot was concerned, on the ground that damages would be an adequate remedy, was merely a prima facie view and lacked the essential element of finality since it is always open to the High Court, at the final hearing, to review the question involved and to arrive at an opposite conclusion in the light of *all* the evidence, both oral and documentary, should the circumstances so require. Accordingly, the legal effect of the refusal of the interlocutory injunction was simply, that at the interlocutory stage, based on the limited material then available, the plaintiffs were not entitled to the injunctive relief claimed. It follows, then, that in a situation such as the present, the law invests the High Court, after dismissing the application for interlocutory injunctive relief, with continuous authority thenceforth to entertain any application by the disappointed party for the like relief *on proof of altered circumstances* and to grant such relief if it appears to be warranted by the evidence.

This brings me to the submission of counsel for the plaintiffs that there had been proof of altered circumstances since the dismissal by Mustapha J of the plaintiffs' application for interlocutory injunctive relief, namely, the risk of a breach of the peace because the second plaintiff, speaking on behalf of himself and the first plaintiff, had in his affidavit affirmed to on 19 March 1988 (en 61) stated, inter alia, as follows:

On 17 March 1988 between 7.00 am in the morning till 2.45 pm in the afternoon, about 100 of the defendants' servants and/or agents came to our farmland with the aid of eight bulldozers and several lorries and destroyed almost all our vegetable plots estimated to be worth about $2,000 – $3,000 if harvested, three chicken coops, pig-sty, store-rooms and water pumps and toilet which structures were all located very near the said premises. They also cut our bamboo trees and a fruit tree and obstructed the flow of a river flowing next to our home by their earthworks.

About 36 workers of the first defendants sat in front of the door-step of our premises and refused to move despite my demands. I believe that some of them were gangsters who just milled around and did not work on the said plot. They were threatening and intimidating me and my family members. One of the workers said that after they complete the demolition of the structures on the farm, they were going to demolish our houses. There were also over 100 policemen and special branch officers on the same plot.

I feared the demolition of our homes. I saw two men from the National Electricity Board come onto our farm and feared that they were going to disconnect our power supply. Furthermore, since we derive an important source of livelihood from the said plot through our poultry, pigs and vegetables, my family members and I tried to stop the first

defendants, their servants and/or agents from destroying our livelihood. I stood in front of the bulldozers to prevent them from further encroaching into the said plot. My life was in grave danger. Despite my repeated demands and resistance, the first defendants continued their high-handed operations. Copies of photographs showing the destruction and various scenes of the operations are annexed herewith and marked as exhibit 'OGS 7'.

Fearing an imminent breach of the peace, we had instructed our solicitors to obtain an interlocutory injunction. At about 1.30 pm, one of our solicitors, Mr Thayalan M, informed one Inspector Shaari who was on the said land that we had obtained an interim injunction and requested the inspector to ask the servants or agents of the first defendants to cease works. We were informed that the inspector used vulgar words and refused to do anything. When we informed the first defendants, their servants and/or agents about the court order, they said that they were not bothered because there was no written order and that they had not received any instructions from their solicitors. When we asked them to check with their solicitors, they refused to do so.

Only when our solicitors Mr Mohideen and Ms Meena arrived on the scene at 2.45 pm did they stop their works.

... a similar provocation resulted in the death of a resident, Tan Siew Kee, deceased, on 29 October 1982.

I fear that if the defendants are allowed to come into the said plot again and if my family members and I resist, then there would be a serious breach of the peace resulting in violence. The first plaintiff and I are prepared to deliver possession of the said plot provided the first defendants obtain a court order directing us to do so.

(I would, at this point, interpolate to mention that counsel for the plaintiffs informed the court that all references in the aforesaid portions of the affidavit to the first and second defendants should read the third and fourth defendants respectively. Later, a corrective affidavit (en 69) to this effect was put in. Similarly, a proposed amended statement of claim disclosing a cause of action against the third and fourth defendants was also put in, to which amendments counsel for the defendants had no objection. As I have already observed, it was on this basis and with the express consent of counsel on both sides that the entire argument before me proceeded.)

My attention was drawn by counsel for the plaintiffs to the fact that the point about the risk of a breach of the peace was never argued before Mustapha J and that Miss Meenakshi Raman, his learned junior, who had appeared as counsel in those proceedings told him so. It is apparent from the materials available to me that at the time of the proceedings before Mustapha J there was no reason to suppose that there was likely to be a breach of the peace in the event of the first and second defendants, their servants or agents resorting to the remedy of self-help to recover possession of the dwelling houses and the farm.

However, in *Hoystead* v *Commissioners of Taxation*,[11a] Lord Shaw, delivering the advice of the Judicial Committee of the Privy Council said, inter alia, at p 165:

> Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted.

But, I fail to see how that passage applies to the particular circumstances of this case. The plaintiffs are now relying, for the first time, on the point as to the risk of a breach of the peace, a point which was not argued before Mustapha J for the very good reason that no such risk then existed. Nowhere in the affidavit filed in support of the plaintiffs' application (en 3) before Mustapha J was there anything even implying that there would be a risk of a breach of the peace; in particular there was no allegation therein that the plaintiffs would resist any attempt by the defendants to enter the property concerned without an order of court.

But now, in para 21 of the affidavit (en 61) filed in support of the plaintiffs' application, there is a clear intimation that if the defendants concerned attempt to enter the dwelling houses and the farm otherwise than by the authority of an order of court , the plaintiffs will resist such attempt. In the event of such resistance a breach of the peace resulting in the loss of life may well follow; if so, damages would not be a sufficient remedy since it could be said that no amount of money can make up for the loss of a life. However, I hasten to add that this is a point which I shall have to consider when dealing with the merits of the application.

The plaintiffs have also relied on another change of circumstances and it is this. It was argued, and I agree, that O 89 of the Rules of the High Court 1980 (derived from the UK O 113) which provides for a speedy and cheap process for plaintiffs to recover possession of immovable property was not yet in force at the time when the proceedings before Mustapha J were heard. The question that arises is: should not the plaintiffs now have recourse to this summary procedure to recover possession rather than resort to their common law remedy of self-help and run the risk of a breach of the peace? The point I am making is that this aspect of the case, like the aspect regarding the risk of a breach of peace, does suggest altered circumstances since the dismissal of the plaintiffs' application by Mustapha J which invests this court with the jurisdiction or power to grant such interlocutory injunctive relief if it appears to be warranted by the evidence. However, whether or not the evidence warrants such a conclusion is a matter which I can only determine after hearing the application on the merits.

For the purposes of ruling on the plea of res judicata, at this preliminary stage, I did not and indeed could not make any finding, even on a *prima facie* basis, as to whether there was a likelihood of a breach of the peace in

the event of the interlocutory injunction not being granted. Nevertheless, it is, I consider, relevant for me to have referred to the portions of the affidavit aforesaid as showing that the plaintiffs were alleging altered circumstances since the date of the order of Mustapha J dismissing their application for interlocutory injunctive relief and this is a crucial factor for purposes of investing this court with the jurisdiction to entertain a fresh application for the like relief. I would, however, emphasize that whether or not the plaintiffs should be granted such relief was a separate matter which I could only determine after hearing counsel on both sides on the merits of the plaintiffs' application.

For the foregoing reasons, I was of the view that the plea of res judicata or issue estoppel did not apply in this case. On a further ground also the plea of res judicata or issue estoppel must fail.

It is axiomatic that a judicial decision inter partes operates as an estoppel in favour of and against parties and privies only, not third persons or strangers: see the *Duchess of Kingston's* case.[12] By definition, privies include any person who succeeds to the rights or liabilities of the party upon his death (see *Douglas* v *Forrest*;[13] *Don* v *Lippmann*;[14] *Holland* v *Clark*[15] (personal representatives in Scottish action)) or insolvency (see *Douglas* v *Forrest*[13] (assignees entitled to the benefit of the estoppel); *Re South American and Mexican Co, ex p Bank of England*[16] (liquidator of company liable to the estoppel)) or who is otherwise identified with his or her estate or interest (see *R* v *Blakemore*[17] (privy in estate); *Re Allsop and Joy's Contract*[18] (successor in title); *Attorney-General for Trinidad* v *Eriche*[19] (identical in title and interest); *O'Connor* v *O'Connor*[20] (successor in title to land)) but it is essential that he who is later to be held estopped must have had some kind of interest in the previous litigation or its subject matter (per Lord Reid in *Carl-Zeiss Stiftung* v *Rayner and Keeler Ltd*[21] at p 550).

Now, it will be recalled that the interim injunction which I had granted on 21 March 1988 in its modified form was directed not against the first and second defendants but against the third and fourth defendants who were not parties to the proceedings before Mustapha J. But counsel for the defendants contended that the third and fourth defendants were privies or successors in title to the first and second defendants respectively. In particular it was contended that the third and fourth defendants had derived their right and interest from the first and second defendants respectively.

However, the burden of proof as regards identity of party or privies lies on the person asserting the estoppel and failure to discharge this burden means that the plea of estoppel will be defeated: see eg *Fernando* v *Gunatillaka*[22] (at p 364); *O'Keefe* v *Williams*[23] and *Blohn* v *Desser*[24] (at p 124). I failed to see where the evidence was that the third and fourth defendants were privies to the first and second defendants respectively as alleged or at all.

On the other hand, counsel for the plaintiffs had submitted – and counsel for the defendants did not demur to this – that the registered proprietors of the plot were and are the trustees of Leong San Tong Koo Kongsi who had granted a registered lease to the third defendants, the developers. Consequently, the third defendants did not derive their title to the plot from the first defendants but from the said trustees who, be it noted, were never parties to these proceedings or the proceedings before Mustapha J. The fourth defendants were merely independent contractors serving the developers. With these submissions I agree.

In all the circumstances I was thoroughly convinced that the plea of res judicata and/or issue estoppel was devoid of substance and it was accordingly dismissed.

I shall now consider the plaintiffs' application on the merits, regard being had to the principles enunciated by Lord Diplock in the oft quoted case of *American Cyanamid* v *Ethicon Ltd.*[25] Firstly, are there serious questions to be tried? I need hardly say that the case of *Leong San Tong Khoo Kongsi (Penang) Registered & Ors* v *Poh Swee Siang*[26] ('the 1987 decision of the Supreme Court in *Poh's* case'), where similar if not the same issues were involved as in the present case, does not operate as res judicata to preclude the plaintiffs herein from raising the same issues for the simple reason that the plaintiffs herein were not parties in that case: see *Re Waring, Westminster Bank Ltd* v *Burton-Butler.*[27]

But the question arises, whether the 1987 decision of the Supreme Court in *Poh's* case aforesaid binds the plaintiffs herein. To answer this question, it is important to bear in mind the distinction between the doctrine of res judicata in its wider sense or estoppel per rem judicatam as it is sometimes known, on the one hand, and the doctrine of judicial precedent on the other. It is right to say, at the risk of being trite, that unlike the doctrine of res judicata the doctrine of judicial precedent depends not on the maxim interest republicae sit finis litium, but simply upon the desirability of certainty and uniformity in the law. In particular, res judicata is concerned with a decision by a court of competent jurisdiction on concrete issues between parties, which will forever bar a party thereto from raising the same issue against the other party to the decision, whether before the same court, or before any court exercising a higher or lower jurisdiction. This is well illustrated by the following passage in the judgment of the Court of Appeal in *Marginson* v *Blackburn Borough Council*[28] (at p 438):

> This seems to us to be a clear discussion on the same issue between the same parties litigating in the present case, and establishing conclusively, albeit in the county court, in a claim by the defendants against the present plaintiff, that both were equally to blame.

But, the doctrine of judicial precedent has nothing to do with concrete issues between the parties. Its effect is to declare the law, not the facts, and to declare it so as to be binding upon all persons; it matters not whether they were parties to the proceedings or not, in all courts of inferior jurisdiction, and in some cases of the same jurisdiction but not to be binding on courts of higher jurisdiction in which the ratio decidendi of the former decision is open to review. Having stated the essential distinction between the two doctrines of res judicata and judicial precedent, I must return to consider the question whether the 1987 decision of the Supreme Court in *Poh's* case is binding upon all the persons including, of course, the plaintiffs herein.

A perusal of the judgment of Hashim Yeop A Sani SCJ, speaking for the Supreme Court in that case, shows that there were four critical issues raised at the hearing of the appeal. They may be stated thus:

(1) Was Poh's tenancy coupled with an equity or, in other words, did he have an equitable interest in the farmland and premises the subject matter of the suit?

It had been argued for Poh both in the High Court and in the Supreme Court that his claim to an equity was based on certain representations made by the owners and that in reliance thereon he had expended money and effort to develop the land concerned into a valuable farm. The defendants had contended to the contrary. Clearly, the issues thus raised were *purely factual* and, in the event, there were concurrent findings of fact both by the High Court and the Supreme Court in favour of the defendant owners.

Accordingly, these being findings upon issue of fact, albeit made by the Supreme Court, are with respect not binding on this court and so this court is at liberty to consider the questions whether upon the facts in the present case the representation as alleged by the plaintiffs herein had been made by the owners concerned and if so whether in reliance upon the same the plaintiffs herein had expended money and effort to develop the land concerned into a valuable farmland as they allege.

To emphasize this point, I would draw attention to two other related cases, namely, civil suit no 24-503-86 and civil suit no 22-3-86.

In the first of these cases, there had been an application for summary judgment by the defendants on their counterclaim because of the judgment of Ajaib Singh J, at first instance, in *Poh's* case where his Lordship had held that Poh had no equitable interest in the land. But Mohamed Dzaiddin J dismissed the application and granted an interlocutory injunction; apparently, because he was satisfied that there were triable issues. This was on 17 April 1987. An appeal by the defendants to the Supreme Court against this decision was, however, discontinued following a settlement.

In the second of these cases, there was also an application by the defendants for summary judgment on their counterclaim and for the statement of claim to be struck out but Mohamed Dzaiddin J dismissed it and ordered an early trial. This was also on 17 April 1987. Similarly, an appeal to the Supreme Court against this decision by the defendants was also discontinued following a settlement.

(2) The second issue in *Poh's* case (ibid) was: whether the period of the notice to quit served upon him was sufficient to determine his tenancy?

Clearly, this issue raised what was a question of fact. In the event, upon this issue too, there were concurrent findings of fact by the High Court and the Supreme Court in favour of the defendant owners. The question whether the notice to quit in the present case was sufficient to determine the tenancy of the plaintiff herein is also a question of fact and must be determined having regard to the evidence tendered at the final hearing.

(3) The third issue in *Poh's* case (ibid) was: whether ss 7 and 8 of the Specific Relief Act 1950 exclude the common law remedy of self-help?

The Supreme Court answered this question in the negative, disagreeing with certain decisions of the Indian Supreme Court. Clearly, this part of the decision of our Supreme Court, being on a *point of law*, is binding upon this court by virtue of the doctrine of judicial precedent.

However, counsel for the plaintiffs had stated that he wished to reserve this point of reconsideration by the Supreme Court having regard to certain passages in the judgment of Lord Denning in *McPhail* v *Persons, Names Unkown; Bristol Corporation* v *Ross and Anor*,[29] especially since the majority judgments of the Supreme Court in the recent case of *United Engineers (M) Bhd* v *Lim Kit Siang*[30] showed that the Supreme Court was not bound by its own decisions even in civil cases.

(4) A fourth issue before the Supreme Court in *Poh's* case (ibid) was: whether the premises concerned had been completed after 31 January 1948? If so, they were outside the ambit of the provision of the Control of Rent Act 1966.

Clearly, this was a question of fact and, in the event, there were concurrent findings of fact thereon both by Ajaib Singh J and the Supreme Court in favour of the defendant owners.

In the present case, this same point will arise for decision as regards one of the two dwelling houses, namely, no 426/258K, but not as regards the other dwelling house, namely, no 301/259H, which it was common ground was completed after 31 January 1948.

Accordingly, counsel for the defendants conceded, so far as dwelling house no 426/258H was concerned, that he did not propose to offer any opposition to the application for an interlocutory injunction until the final determination of the suit, if the court were disposed to granting the same. Indeed, he had directed my attention to the fact that at the proceedings before Mustapha J the defence had conceded that this particular dwelling house might be subject to the Rent Act.

However, in so far as dwelling house no 301/259H was concerned, he opposed the application for the grant of an interlocutory injunction because – so he said – the plaintiffs were relying on a *bare allegation* that they were entitled in law and equity to possession of the plot of land concerned and all buildings standing thereon. In particular, it was argued that the plaintiffs' assertion (see para 4 of en 61) that in 1961 the deceased Cheong Ah Pit had, with the consent of the owner, erected dwelling house no 301/259H to accommodate his family which had grown very large, even if true, did not protect their occupation of it, either in equity or under the provisions of the Rent Act.

In considering this branch of counsel's argument, I have two preliminary observations to make. Firstly, all I was concerned with, at this stage of the proceedings, was whether the affidavits disclosed serious questions to be tried. Secondly, para 4 of en 61 of the affidavit of the second plaintiff, which counsel had singled out for critical comment, should not be read in isolation but in the context of the rest of that affidavit and having regard to the plaintiffs' case as a whole as disclosed in the proposed amended statement of claim.

Approaching the question raised by counsel in this way, it is manifestly clear that the plaintiffs were alleging that as a result of the belief induced by the said trustees that they could stay on the said plot and carry on their farming activity as long as they wanted, they had expended a substantial sum of capital and labour in building and improving the *houses* and converting what was once jungle land into a fertile farm (see para 8 of en 61). This was, of course, wholly consistent with para 1 of the proposed amended statement of claim dated 25 March 1988 wherein the plaintiffs had alleged that they 'are and were at all material times entitled in law and equity to possession of a plot of land forming part of holding no 2532, mukim 13, NED, Penang, and lot no 2497, mukim 13, NED, Penang, and on which are situated the plaintiffs' premises bearing nos 426/258K and 301/259H, mukim 13, Thean Teik Estate and vegetable farm.'

In other words, the plaintiffs were, by the assertions aforesaid, inviting the court to *infer* from the fact that they had expended a substantial sum of capital and labour in building and improving both the dwelling houses and converting what was once jungle land into a fertile farm that they must have been *encouraged* to do so by the representatives of the owners that they could stay on the plot concerned and carry on their farming activity as long as they wanted. *If*, but only *if*, at the trial the plaintiffs are able *to prove* these assertions would they be able to pray in aid the following passage in the judgment of Salleh Abas FJ (as he then was) in *Mok Deng Chee* v *Yap See Hoi & Ors*[31] (at p 323):

> ... In the absence of any contrary evidence, we must assume that the house must have been built with encouragement and approval or at least without any objection by the previous landowner. Thus the expenditure involved in its construction raised in favour of Hong Kong an equity making him a tenant with an equitable estoppel. The tenancy together with its equity devolved on to the appellant's father, when Hong Kong sold the house to him, and on his father's death the equity devolved on the appellant as a result of the transmission of the house to him ...

Furthermore, provided always the plaintiffs can prove their assertions, it would make no difference to the plaintiffs' claim that premises no 301/259H were not subject to rent control legislation. So, for example, in *Bank Negara Indonesia* v *Philip Hoalim*,[32] the Privy Council held that despite the fact that the defendant had no protection under the Rent Acts, he had an equity to remain 'so long as he continued his profession'.

In these circumstances, the submission of counsel for the defendants that the plaintiffs were relying on 'a bare allegation' in support of their plea that their possession of dwelling house no 301/259H was protected in equity was quite untenable. It goes without saying, however, that whether or not the plaintiffs are able to make out their claims at the trial when all the evidence will be before the court, with full opportunity for cross-examination, must remain to be seen. In the meanwhile, however, I was satisfied that there were also serious questions to be tried, as regards the plaintiffs' claim that they have an equity to remain in possession of dwelling house no 301/259H.

In summary, therefore, as regards the question whether there are serious questions to be tried as to the plaintiffs' alleged right to remain in occupation not only of the two dwelling houses but the farm as well, I would say, 'Yes'.

I now turn to consider the next question, following the *American Cyananid* principles, namely, would damages be a sufficient remedy? It was strongly argued by counsel for the plaintiffs that damages would not be an adequate remedy having regard to the particular circumstances of this case. Specifically, my attention was directed to the following matters:

(1) The plaintiffs and their forebears had been in possession of the plot of land concerned (on which the second plaintiff's grandfather Cheong Ah Pit had

built the dwelling house no 258K/486) for nearly 100 years and which they had developed into valuable farmland.

(2) The plaintiffs and their families have, at all material times, lived in dwelling house no 258K/426 and also in the other dwelling house no 301/259H constructed by the second plaintiff's grandfather, Cheong Ah Pit, in 1963, and they also depend upon the produce of the farmland as an important source of their livelihood.

(3) If, therefore, at the trial, the court were to hold that the plaintiffs are entitled to possession of the plot of land concerned and the dwelling houses but, before the trial, the third and fourth defendants, their servants or agents had entered the same without the leave or licence of the plaintiffs, then such entry would amount to an actionable trespass at law. Furthermore, in such an eventuality, there would always be present the risk of a breach of the peace which could result in loss of life as in fact had happened not so long ago.

In the case of *Lim Khoo Eong* v *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & 2 Ors*[33] a decision which was upheld on appeal to the Supreme Court, I dealt with the question whether damages would be an adequate remedy if a plaintiff could show that some equitable right was vested in him, in a situation where the factual matrix bears a strong resemblance to that of the present case, in the following terms (at p 628 col A to H):

> ... I shall deal with the question of whether damages would be an adequate remedy for the plaintiff.
>
> If the plaintiff is correct in his contentions then, quite apart from the contractual rights of tenancy which he enjoys, the facts would give rise to an equity which would protect his occupation of the vegetable plot and the building plot (with dwelling house thereon), so that were the defendants to bring an action to evict him they would acting in violation of the original representation made to the deceased Lim Ah Khim, as to the duration of his tenancy, and in reliance on which a detriment was incurred. In such a situation, the court could refuse an action for possession and declare that the plaintiff could remain in occupation for as long as he uses the vegetable and building plots for the purpose agreed: see *Inwards* v *Baker* [1965] 2 QB 29; [1965] 1 All ER 446; *Williams* v *Staite* [1979] Ch 291.
>
> 'Indeed,' say Meagher and Gummow in their textbook on *Equity: Doctrines & Remedies*, 'that whenever a plaintiff can show that some equitable right is vested in him which the defendant has threatened to infringe, or which the defendant has already infringed and is either continuing to infringe or about to infringe repeatedly, the plaintiff may obtain an injunction as of right.'
>
> This proposition accords with reason and justice for, should it be otherwise, the denouement could be tantamount to enabling a wrongdoer to buy out his victim compulsorily at a price fixed by the court.
>
> Bearing in mind the above considerations and the fact that the plaintiff and his family depend for their livelihood on the farm, I am satisfied that were he to succeed at the trial in establishing his right to a permanent injunction, he would not be adequately compensated by an award of damages.

It is, of course, true to say that a review of the cases shows that there are different ways in which a court may satisfy an equitable right vested in a plaintiff protecting his occupation of land. The following are some examples.

In *Inwards* v *Baker*,[34] the owner of land told his son that he could build on it and then live there; in particular, he had said, 'Why not put the bungalow on my land and make the bungalow a little bigger.' The son, who had an expectation 'of being allowed to stay there' but not that the land was his, did just that, spending money on building and remaining in occupation for the remainder of his father's life. The representation by the father coupled with the detriment incurred in reliance on this assurance was held to give the son rights to the land. The method of protection which the court gave was merely to refuse an action for possession against the son and declare that he could remain on the land for as long as he desired to use it as a home.

In *Williams* v *Staite*,[35] again there was no unequivocal assurance that the cottage belonged to the young couple, but the parents, when they came to live, merely made a promise that: 'You can live here as long as you wish.' Once more, therefore, if the couple had been led to expect occupation rights falling somewhat short of an outright conveyance of a fee simple, it seems only right that the court should select a remedy which gives effect to what was intended. Accordingly, the court simply dismissed the action.

In *Ives (ER) Investments Limited* v *High*,[36] the plaintiffs were refused an injunction to restrain the defendant from exercising a right of way across the former's land.

In *Siew Soon Wah & Ors* v *Yong Tong Hong*,[37] the Privy Council held that there was an equity or equitable estoppel protecting the defendant in his occupation for 30 years.

I have already noted that it makes no difference if the premises concerned, such as dwelling house no 301/259H, are not subject to rent control legislation provided the plaintiffs can show that their occupation was protected in equity as appears from the decision of the Privy Council in *Bank Negara Indonesia* v *Philip Hoalim*.[32] In the case of controlled premises, such as dwelling house no 258K/426, the decision in *Luganda* v *Service Hotels Ltd*[38] shows that the proper remedy for the occupant of a dwelling ejected contrary to the Rent Act 1977 is a mandatory injunction requiring the ejector to allow him access and occupation: he is not limited to damages, since this would encourage the very mischief which security of tenure under the Rent Act 1977 was designed to protect

In all the circumstances, I was satisfied that were the plaintiffs to succeed at the trial in establishing their claim to an equity protecting their occupation damages would not be an adequate remedy. If, on the other hand, I was wrong in so holding, and it could be said that there was doubt as to the adequacy of damages, then I went on to consider the balance of convenience.

In *Cayne* v *Global Natural Resources plc*,[39] May LJ echoing the views expressed by Sir Megarry VC explained the term 'balance of convenience' – a term of art – in this way (at p 237H):

> That (the 'balance of convenience') is the phrase which, of course, is always used in this type of application. It is, if I may say so, a useful shorthand, but in truth, and as Lord Diplock himself made clear in the *NWL* case, the balance that one is seeking to make is more fundamental, more weighty, than mere 'convenience'. I think that it is quite clear from both cases that, although the phrase may well be substantially less elegant, the 'balance of the risk of doing an injustice' better describes the process involved.

In *Francome* v *Mirror Group Newspapers*,[40] Sir John Donaldson MR expanded on the same theme in this way (at p 898E):

> I stress, once again, that we are not at this stage concerned to determine the final rights of the parties. Our duty is to make such orders, if any, as are appropriate pending the trial of the action. It is sometimes said that this involves a weighing of the balance of convenience. This is an unfortunate expression. Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are usually asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so doing, we are seeking a balance of justice, not of convenience.

The next stage of the enquiry is what should be taken into account in considering 'the balance of convenience'? The question is not readily susceptible of answer. But, this was what Lord Diplock said in the *American Cyanamid* case[25] at p 408F:

> It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

I have already adverted to the unchallenged fact that the plaintiff and their families have their homes in the two dwelling houses, that they depend on the farm for their livelihood and have a market for their vegetable produce for many years. In these circumstances, to allow the third and fourth defendants at this stage to move in would be a serious disruption of the plaintiffs' business, thus seriously undermining their livelihood and that of their families..

On the other side of the scale, it is no doubt true to say that were an interlocutory injunction granted as prayed, it would most probably result in heavy financial losses to the third and fourth defendants. But then, there is no gainsaying the fact that these defendants had embarked upon their joint venture for development of the land well knowing that the plaintiffs would most certainly resist attempts to disposses them and that litigation was bound to ensue as indeed it has done.

In *Belfast Ropework Co Ltd* v *Pixdane Ltd* [41] it was held not to be a conclusive argument in the defendant's favour on the balance of convenience in a commercial case that the grant of an interlocutory injunction would delay the development of his business, and thereby deprive him of the opportunity of earning profits with which to contest the substantive hearing; if it was so, he should not have embarked on the venture knowing that litigation would probably ensue.

In these circumstances where does the balance of convenience lie? It was my opinion that for the reasons stated, it lay in favour of the plaintiffs. If other factors are equally balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo: *American Cyanamid*[25] at p 408G. The rationale is that if the defendants are enjoined temporarily from doing something that they have not done before, the only effect of the interlocutory injunction in the event of their succeeding at the trial is to postpone the date at which they are able to embark upon a course of action which they have not previously found it necessary to undertake. On the other hand, to interrupt them in the course of an established enterprise would cause much greater inconvenience to them since they would have to start again to establish it in the event of their succeeding at the trial: *American Cyanamid*[25] at p 408G-H.

In the present case, the effect of the grant of an injunction would be *not* to interrupt the third and fourth defendants in the course of an established enterprise though it would admittedly interrupt them from embarking upon a new enterprise, namely, that of housing development. On the other hand, the plaintiffs' business of selling their vegetable produce derived from their farm has been an established enterprise for generations and not to grant the injunction may have the effect of depriving them of an important, if not essential, source of their livelihood; it would amount to *disturbing a state of affairs which had previously existed.*

When considering the problem of the status quo and, in particular, the difficulty of pinponting when precisely 'ante' the 'status' was 'quo' Megaw LJ dealt with the matter in *Dunhill (Alfred) Limited* v *Sunoptic SA & Anor*[42] as follows (at p 376):

> I do not think that any assistance is to be derived in this case from consideration of the 'status quo' which is referred to in *American Cyanamid. Like all Latin terms used in a legal context, it is necessary to try to see what, in English, the Latin term is intended to convey. 'Status quo' or, more fully, 'status quo*

ante' means simply 'the existing state of things' ... existing before a particular point of time. For that to be of any help, it is necessary to answer the question: Existing when? Before what point of time? For the answer may be different, according as you look at the existing state of things at the date when the defendant did the act, or the first act, which is alleged to have been wrongful; or the date when the plaintiff first learned of that act; or the date at which the plaintiff ought first to have been aware of that act; or the date when the plaintiff first complained to the defendant; or the date when he issued his writ. I think the relevant point of time for purposes of the 'status quo' may well vary in different cases.

And when considering the definition of the term 'status quo', Sir John Pennycuick said in *Fellowes* v *Fisher*[11] at pp 199H-200A:

> By the expression 'status quo' I understand to be meant the position prevailing when the defendant embarked upon the activity sought to be restrained.

Similarly, in *Garden Cottage Foods Ltd* v *Milk Marketing Board*,[43] Lord Diplock said this (at p 140D):

> The duration of that period since the state of affairs last changed must be more than minimal, having regard to the total length of the relationship between the parties in respect of which the injunction is granted; otherwise the state of affairs before the last change would be the relevant status quo.

In the context of the present case, I have no doubt that the status quo means the position prevailing immediately before the making of the plaintiffs' application for ex parte interim relief when the third and fourth defendants embarked upon the activities sought to be restrained.

I must next deal with the sufficiency of the plaintiffs' undertaking as to damages. It is true that an undertaking by a plaintiff as to damages ought to be given on every interlocutory injunction, though not where the order is in the nature of a final order: *Fenner* v *Wilson*;[44] and except under special circumstances effect ought to be given to it (per James LJ in *Graham* v *Campbell*[45]). See also note by Jessel MR in *Newcomen* v *Coulson*.[46]

This requirement applies even if the plaintiff has no assets and is legally aided: *Allen* v *Jambo Holdings Ltd*.[5] It is true, that perhaps, in such circumstances the undertaking is an empty shell and should not therefore be demanded since the maxim is that equity does not act in vain. But the response to this argument is that such a plaintiff may win damages at the trial and yet may have wrongly obtained an interlocutory injunction as in *Barclays Bank Ltd* v *Rosenberg*.[48] In such an eventuality, the damages awarded would constitute assets available to meet the liability on the undertaking.

In any event, the court will not generally deny a plaintiff an interlocutory injunction to which he would otherwise be entitled simply on the ground that his cross-undertaking in damages would be of limited or of no value. So, for example, in *Allen* v *Jambo Holdings Ltd* [5] the Court of Appeal held, when granting a Mareva injunction, that a cross undertaking was acceptable from the plaintiffs although he was legally aided. The rationale behind this was that questions of financial ability ought not to affect the position in regard to what is the essential justice of the case.

In the present case, I had been told that the plaintiffs were indebted to the first defendants in the sum of $3,236.50, being taxed costs awarded in the litigation before Mustapha J being summons-in-chambers (entered no 566/82) to which I have previously adverted. Moreover, there is now also pending before me a prayer that the first defendants be granted leave to execute the writ of seizure and sale dated 15 June 1984 in respect of these taxed costs. I have, however, adjourned the hearing of the same as I consider that in the interests of justice it should await the final determination of this suit. The plaintiffs have won costs in the two applications before me which occupied four full days of argument and it may be that the plaintiffs may succeed at the final hearing in which case they would win more costs and perhaps damages far in excess of the sums due to the first defendants. Moreover, there is also an appeal against my decision and it would be prudent to await the result thereof.

In all the circumstances, on the usual undertaking as to damages, I had, in the exercise of my discretion, granted to the plaintiffs an interlocutory injunction restraining the third and fourth defendants whether by themselves or their servants or agents or otherwise howsoever from entering, trespassing and/or carrying out works on that portion of the land forming part of holding no 2532, mukim 13, NED, Penang and lot 2497, mukim 13, NED, Penang, and on which are situated the plaintiffs' dwelling houses bearing nos 426/258K and 301/259H, mukim 13, Thean Teik Estate, and their farm until the final determination of this suit or until further order.

In consequence, the application for discharge of the interim injunction directed against the third and fourth defendants, their servants or agents and for consequential orders was dismissed with costs. But, the prayer therein for leave to execute the writ of seizure and sale in respect of the taxed costs of $3,236.50, hereinbefore mentioned, was adjourned to a date to be fixed by the senior assistant registrar. Finally, I ordered an early trial of the suit.

By way of postlude, there is one final matter which I should like to touch upon. On the morning of 15 April 1988, at my behest, counsel on both sides attended before me in chambers and I raised an inquiry with counsel for the defendants, namely, when was it, I asked, had the third and fourth defendants replaced the first and second defendants, as developers and contractors respectively, as had been contended by the plaintiffs (see en 69)? I

added that I needed this information as I thought it, perhaps, desirable to incorporate this fact in my judgment when describing the narrative of events. Mr Rajasingam then replied that he would need a few hours to seek instructions on the point and when I proposed a meeting at 3.00 pm he said this was acceptable.

Accordingly, when counsel on both sides reconvened at a little past 3.00 pm the same day, I repeated my inquiry and Mr Yeoh's response was this: 'The third defendants took over rights and liabilities of the first defendants with effect from April 1982. The third defendants have been the registered lessees since August 1983.' He added, 'the second and fourth defendants were appointed earth contractors and they remain so up to today. The second defendants were appointed by the first defendants in December 1981. The fourth defendants were appointed in April 1982.'

Mr Mohideen Abdul Kader then interposed to ask, 'who was working on the plaintiffs' plot at the time of the alleged wrongful acts complained about and which occurred on 18 March 1988?' I thought this a most material question since it was these acts which caused the plaintiffs to successfully move the court for the interlocutory injunction. In answer, both Mr Yeoh and Mr Rajasingam confirmed that it was the third and fourth defendants, their servants or agents who were working there then – which, in my view, confirmed the propriety of the interlocutory injunction in the form it now takes.

Order accordingly.

Solicitors: *Meena Rajes & Partners*; *Shearn Delamore & Co*; *Drew & Napier*.

Reported by *Wong Kim Fatt*

Jin Sen Hong (1971) Sdn Bhd v Khiing Sie Khuo (Syarikat Kion Hoong Cooking Oil Mills Sdn Bhd, Intervener)

HIGH COURT (SIBU) – SUIT NO 28 OF 1986
CHONG SIEW FAI J
11 APRIL 1988

Civil Procedure – Judgment debt obtained – Charging order on shares registered in name of judgment debtor made subsequently – Application by intervener to discharge charging order by reason of pledge of shares given by judgment debtor to intervener – Whether pledge is valid – Whether charging order subject to pledge

The plaintiff obtained judgment against the defendant for a certain sum of money. Later, on an ex parte application of the plaintiff, a charging order on some shares in Kion Hoong Organization registered in the name of the defendant was made. The intervener then sought to discharge the charging order or, alternatively, to rank the charging order subject to the rights and interests of the intervener, by reason of a written pledge of the shares made earlier by the defendant in favour of the intervener. The present dispute is therefore between the plaintiff and the intervener as to whether the pledge to the intervener is good and whether the charging order will rank subject to the pledge. For the plaintiff, reliance was placed on art 14 of the articles of association of the Kion Hoong Organization for the contention that the charging order obtained by the plaintiff should prevail over the pledge in favour of the intervener. Article 14 stated that 'the company shall be entitled to treat the registered owner of any share as the absolute owner thereof, and accordingly shall not be bound to recognize any equitable or other claim to or interest in such share on the part of any other persons save as herein provided'. The plaintiff also contended that as the intervener was a wholly-owned subsidiary company of the Kion Hoong Organization, the pledge by the defendant of his shares in the Kion Hoong Organization to the intervener amounted to the company dealing in its own shares indirectly and is in contravention of s 67 of the Companies Act 1965.

Held, allowing the intervener's application: (1) On the evidence, there existed and still exists a pledge of the shares by the defendant to the intervener.

(2) The effect of art 14 is, if Kion Hoong Organization so wishes, to treat the registered holder of any share as the absolute owner and to relieve itself from recognizing equitable interests in such shares. Kion Hoong Organization is not a party to these proceedings and is not asserting any right, claim or relief by virtue of art 14 of its articles of association.

(3) Article 14 does not operate to give the plaintiff a better right over that of the intervener by virtue of the charging order. The charging order is to be subject to the pledge created in favour of the intervener.

(4) The evidence establishes that the defendant trading under the firm of Kion Hoe Importers & Exporters was indebted to the intervener for goods sold and delivered to the defendant and as security for payment of the debt, the defendant pledged the shares to the intervener. There is no question of any of the two companies providing funds or financial assistance for the purposes of, or in connection with, the purchase or subscription of shares in the intervener, company or in its holding company or that any of the two companies in any way purchased, dealt in or lent money on its own shares.

Cases referred to

1 *Harrold* v *Plenty* [1901] 2 Ch 314 (refd)
2 *Simpson* v *Molsons' Bank* [1895] AC 270 (refd)
3 *Cooper* v *Griffin* [1892] 1 QB 740 (refd)
4 *Howard* v *Sadler* [1893] 1 QB 1 (refd)
5 *Max Hilckes* v *Lee Choon Guan* [1912] 1 MC 17 (refd)
6 *Re General Horticultural Company, ex p Whitehouse* (1886) 32 Ch D 512 (refd)
7 *Gill* v *Continental Union Gas Co Ltd* (1872) LR 7 Exch 332 (refd)
8 *Hawks* v *McArthur & Ors* [1951] 1 All ER 22 (refd)
9 *Halliday* v *Holgate* (1868) LR 3 Exch 299 (refd)

Legislation referred to

Companies Act 1965 ss 67, 163(4)
Contracts Act 1950 s 125